NOT TO BE INCLUDED
IN BOUND VOLUMES

MPMc
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BAKER DC, LLC
Employer

and

Case 05-RC-135621

OPERATIVE PLASTERERS & CEMENT
MASONS INTERNATIONAL ASSOCIATION,
LOCAL 891
Petitioner

DECISION ON REVIEW AND ORDER

On November 25, 2014, the Regional Director for Region 5 issued a Supplemental Decision and Notice of Hearing in which he overruled the Employer's Objections 2 and 3 alleging that the Petitioner engaged in objectionable surveillance and electioneering of voters. On June 26, 2015, the Regional Director issued a Second Supplemental Decision, in which he reconsidered and reaffirmed his November 25, 2014 decision. Thereafter, the Employer filed a timely request for review.[1]

On December 28, 2015, the Board granted the Employer's request for review with regard to Objection 2.[2] Thereafter, the Employer and the Petitioner filed briefs on review.

[1] Although the Employer filed its submissions as exceptions, the Board treated them as a request for review, pursuant to the Board's Rules and Regulations, Section 102.69(c)(4).

[2] In so doing, the Board denied the Employer's request for review with regard to its Objection 3, concerning electioneering. On January 21, 2015, the Employer also filed exceptions to the Hearing Officer's Report with regard to its Objection 1. In our separate unpublished decision issuing with this case, the Board adopted the hearing officer's findings and recommendations, and found that a certification of representative should be issued.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[3]

Having carefully considered the entire record in this proceeding, including the briefs on review, and consistent with Board precedent, we reject the Employer's contention that the mere presence of union agents in the lobby of an office building where the Employer's headquarters was located, without proof of electioneering or other improper conduct, constitutes objectionable conduct sufficient to overturn the election. See *Houston Shell and Concrete Division, McDonough Corp.*, 118 NLRB 1511, 1516 (1957);[4] *Rackle Co.*, 117 NLRB 462, 463 (1957); *Gastonia Combed Yarn Corp*., 109 NLRB 585, 587 (1954). Accord *Harlan #4 Coal v. NLRB*, 490 F.2d 117, 121 (6th Cir. 1974). *Nathan Katz Realty, LLC v. NLRB*, 251. F3d. 981 (D.C. Cir 2001), on which the Employer relies, is distinguishable. In that case, two union agents, sitting in a car within the area designated as a no-electioneering zone, motioned, honked, and gestured to employees arriving at the polling location. That conduct was found to be contrary to the instructions of the Board agent overseeing the election. The Board declined to set aside the election, but the District of Columbia Circuit reversed, reading two Board decisions involving employer agents as "seem[ing] to stand for the proposition that a party engages in objectionable

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[3] Member Emanuel took no part in the consideration of this case.

[4] In *Houston Shell*, supra, the Board observed that it had "frequently stated that the mere presence of union representatives at or near the polling place is not sufficient ground for setting aside an election." 118 NLRB at 1516 (footnote collecting cases omitted). The *Houston Shell* Board overruled an election objection that relied, in part, on evidence that one union representative "stood at the [plant] gate during the balloting" and that other representatives "were at the gate of the plant (which was the only one used by employees in entering the voting area) and were observed talking to voters there." Id. at 1515. In *Milchem, Inc.*, 170 NLRB 362, 363 (1968), the Board reversed *Houston Shell* insofar as it had "held that conversations [between a party representative and employees while waiting to cast their ballots] alone, regardless of their extent, would not void an election." Contrary to our dissenting colleague, then, *Milchem* casts no doubt on the precedential value of *Houston Shell* with respect to the proposition for which it is cited here.

conduct if one of its agents is continually present in a place where employees have to pass in order to vote." 251 F.3d at 993. We need not decide whether the court's interpretation of Board precedent is consistent with the decisions we rely on this case. Cf. *J.P. Mascaro & Sons*, 345 NLRB 637, 638-639 (2005) (distinguishing *Nathan Katz* in case involving continual presence of employer's president outside facility during election). Here, there is no contention that any union representatives were stationed in a no-electioneering zone, nor is there any evidence that they engaged in conduct contrary to the instructions of a Board agent. We also note that the union agents were eight floors away from the polling place, which itself was on the Employer's property.

Dated, Washington, D.C., November 2, 2017

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting in part:

I would remand this case for a hearing on Employer Objection 2, which alleges that union agents engaged in objectionable surveillance at one of the two voting locations by positioning themselves at the building entrance for the entire time the polls were open at that location, which, if credited, would mean every voter at that location was required to pass the union agents when

entering the building to vote.[5] Although the polls were located on the eighth floor of the building and the union agents allegedly stationed themselves at the first floor lobby doors, I believe this distance would not be determinative given that (i) the building was not in use at the time, (ii) the only individuals seeking ingress through the lobby doors were voters entering the building for the sole purpose of voting, and (iii) the voters could gain access to the polls only by going past the union agents positioned at the lobby doors. It bears emphasis that the voters were not entering the building with the possibility that they might vote later in the day. Rather, every voter entering the building was en route to the polls, and if credited testimony introduced at a hearing supports the allegations in Employer Objection 2, every voter encountered union agents at the lobby doors on his or her way to the polls.

"[A] party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote." *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 993 (D.C. Cir. 2001). This is so because surveillance of this character reasonably tends "to convey to these employees the impression that they were being watched." *Electric Hose & Rubber Co*., 262 NLRB 186, 216 (1982). I believe these principles are directly applicable here. As in Nathan Katz Realty, the voters in this case allegedly had no choice but to pass the union agents en route to the polls. Moreover, those agents were in much closer proximity to the voters than was the case in Nathan Katz Realty, where union agents were sitting in a car while employees arrived at the polling location. The Board has granted review based on similar evidence. See *Transcare New York, Inc.,* 355 NLRB 326 (2010) (evidence that voters were required to pass employer's senior managers in order to vote, if

[5] Like my colleagues, I would deny review with respect to whether the Union engaged in improper electioneering.

credited, would warrant setting aside election).[6] Accordingly, in this respect, I believe that the Requests for Review raise substantial issues warranting a hearing.

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PHILIP A. MISCIMARRA, CHAIRMAN

[6] As my colleagues note, the Board has previously overruled objections regarding the presence of union representatives at or near the polling place. But none of those cases involved the type of surveillance present here. See *The Rackle Company of Texas,* 117 NLRB 462 (1957) (union agents stood on public street adjacent to employer's parking lot during election, and at times on the parking lot, where they were visible to employees waiting in line to vote outside entrance to employer's main building at opposite end of parking lot); *Gastonia Combed Yarn Corp.*, 109 NLRB 585 (1954) (union representatives drove employees who needed rides to the polling site and dropped them off at the door to the building while remaining in their vehicle); *Harlan #4 Coal v. NLRB*, 490 F.2d 117, 121 (6th Cir. 1974) (union representatives sat in automobile parked 20 feet from where employees were lining up to vote). *Houston Shell and Concrete Division, McDonough Co.*, 118 NLRB 1511 (1957), also cited by my colleagues, involved allegations that union representatives conversed with voters "on company premises," but not necessarily in the polling place, before the voting began or "the morning that the voting started," and that they were in a polling place when the election began but not necessarily during the election. The case has little precedential value, however, as its holding was expressly overruled in *Milchem, Inc.*, 170 NLRB 362, 363 (1968), where the Board stated, "*Houston Shell* held that conversations alone, regardless of their extent, would not void an election (a ruling, of course, reversed by the instant decision)." In addition, *Houston Shell* did not involve union agents allegedly stationed at the building entrance for the entire time the polls were open at that location, the conduct at issue here.